HIGH COURT OF UTTARANCHAL AT NAINITAL

(Court's order whether the case is or not approved for reporting)
(Chapter VIII Rule 32(2) (b)

Description of the Case.

Criminal Appeal No. 379 of 2001
2807 of 1999 (Old No.)

Smt. Chanda & another …..Appellants

Versus

State …..Respondent

Approved for reporting.

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Note approved for reporting.

Date of Decision 17th September 2004.

Initial of Judge.

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IN THE HIGH COURT OF UTTARANCHAL

AT NAINITAL

Criminal Appeal No. 379 of 2001

2807 of 1999 (Old No.)

Reserved

1. Smt. Chanda W/o Sri Shreeram
2. Smt. Kusum W/o Sri Prakash
   Both R/o Rajiv Colony Govindgarh
   Police Station Cantt.
   Dehradun .....Appellants

Versus

State ……Respondent

Smt. Pushpa Joshi learned counsel for the appellants (Amicus Curiae)
Sri Amit Bhatt learned Addl. G.A. for the State

Coram : Hon'ble M.M. Ghildiyal, J.
Hon'ble B.C. Kandpal, J.

(Delivered by Hon'ble B.C. Kandpal, J.)

This appeal arises out against the judgment and order dated 20.09.1999 passed by Additional Sessions Judge, Dehradun is S.T. No. 58 of 1998 State Vs. Sumer Chand and others convicting the appellants under Section 302/34 I.P.C. and sentencing them for life imprisonment as well as fine of Rs. 5,000/- each and in fault of payment of fine further simple imprisonment of three months.

During the trial one of the accused Sumer Chand died, therefore, the case against him abated but the trial continue against the other appellants, namely, Smt. Chanda and Smt. Kusum who have filed the present appeal before the Court.

Brief facts of the prosecution case are that on 19.12.1997 at about 7:30pm, the accused Sumer Chand, Smt. Chanda and Smt. Kusum with an intention to commit murder of one Sri Tek Chand sprinkled kerosene oil on him and set him of fire.

Smt. Chanda W/o Sri Ram Swarup submitted a written report at police station Dalanwala and on the basis of which a case was registered under Section 307 I.P.C. against all the three accused. The injured Tek Chand was admitted to the hospital where his dying declaration was recorded by Tehsildar, Dehradun on 20.12.1997 at about 9:00am. Tek Chand succumbed to his injuries; hence, the case was converted into under Section 302 I.P.C.

The post mortem on the body of the deceased – Tek Chand was conducted on 20.12.1997 at 2:30pm. The doctor found rigor mortis present all over the body. The doctor also found burnt injuries all over the body. He also found that the death was caused due to burn injuries.

After the investigation was completed, the chargesheet was submitted against all the three persons under Section 302 and 307 I.P.C.

After submission of the chargesheet, the accused were committed to the court of Session i.e. trial court framed the charge against the accused under Section 302/34 I.P.C. vide judgment and order dated 18.05.1998.

The accused persons denied of the charge leveled against them and claimed their trial.

The prosecution in order to support its case produced P.W.1 Smt. Chanda, P.W. 2 Raj Kumar, P.W. 3 Dr. S.C. Singhal, P.W. 4 Dr. S.K. Nautiyal, P.W. 5 Sri Surya Mohan Nautiyal (Tehsildar), P.W. 6 Abdul Rehman (Head Constable), P.W. 7 Urmila, P.W. 8 Sushil Kumar (S.I.) and P.W.9 Dinesh Kumar Tyagi (S.I.)

After the evidence of the prosecution was over, the statement of the accused were recorded under Section 313

Cr.P.C. The appellant did not adduce any evidence in their defence.

Learned trial court, after having perused the entire evidence on record and hearing the learned counsel for the parties, convicted the accused under Sections 302/34 I.P.C. and accordingly sentenced them to life imprisonment and fine of Rs. 5,000/- each. The trial court also directed that in default of payment of fine the accused/appellants shall have to undergo further simple imprisonment of three months vide judgment and order dated 20.09.1999.

Felling aggrieved by the aforesaid impugned judgment and order the accused/appellants preferred appeal before the Hon'ble Allahabad High Court, which has been transferred to this Court, for disposal, after creation of Uttaranchal State.

We have heard learned counsel for the parties and perused the record.

First of all it has to be assessed on the basis of the evidence available on record as to whether the appellants had actually participated in the crime or not. In this context, the dying declaration of the deceased Tek Chand recorded by the Tehsildar – Surya Mohan Nautiyal (P.W.5) would be relevant as in this dying declaration the deceased has stated that on 19.12.1997 at about 7:00P.M. he was present in his house and Sumer S/o Puran (one of the assailants) came to his house, Sumer and he were talking to each other and during the course of the conversation, Sumer closed the eyes of the deceased and sprinkled the kerosene oil on him and thereafter, put him ablaze. This dying declaration further reveals that Sumer was assisted by his two sisters in putting the deceased to fire.

This dying declaration has been recorded by Tehsildar – Surya Mohan Nautiyal (P.W.5) on 19.12.1997 at 10:55P.M. There is a certificate of the doctor pertaining to the mental condition of the deceased at the time of recording the dying declaration. Therefore, there cannot be any stretch of doubt with regard to the alleged dying declaration. Surya Mohan Nautiyal (P.W.5) has also deposed in his deposition that he recorded the dying declaration of Tek Chand deceased on 19.12.1997. He started writing the dying declaration at 10:45P.M. on the aforesaid day and concluded the same at 10:55 P.M. Nothing has been elicited in the cross examination of this witness which may suggest that the dying declaration is tainted or could be fabricated.

The existence of the dying declaration cannot be ruled out, but it is worthy to mention here that the main assailant Sumer Chand has not filed any appeal as he died during the trial. What has been alleged in the dying declaration is that these two appellants i.e. Kusum and Chanda have aided the main assailant Sumer Chand in putting the deceased ablaze. As far as the role of sprinkling the kerosene oil on deceased and thereafter put him ablaze, is concerned, that has been assigned to Sumer Chand, but no specific role has been assigned to the appellants by the deceased. Therefore, it would be seen by scrutinizing the evidence on record as to what role has been assigned to the appellants and up to what extent they are guilty for committing the murder of Tek Chand.

The prosecution has produced two eye witnesses, namely, Chando (P.W.1) and Raj Kumar (P.W.2) and both these witnesses have stated that they were sitting under Guava tree when the actual incident of putting Tek Chand to ablaze

occurred. These witnesses have also stated that the appellants Chanda and Kusum caught hold the hands of the deceased Tek Chand when the kerosene oil was being sprinkled on him by the third assailant Sumer Chand. Chando (P.W.1) informant has specifically assigned the role of catching hold the hands of the deceased by the appellants Chanda and Kusum. She has also deposed in the cross examination that Tek Chand also told the witness that both the appellants and the Sumer Chand put him ablaze. She has further stated that the appellants Chanda and Kusum had only caught hold the hands of the deceased Tek Chand and they did not in fact ablaze him. She has also stated that none of the domestic article kept inside the room was burnt during this incident. Likewise Raj Kumar (P.W.2) has also stated that Sumer Chand sprinkled the kerosene oil and the appellant Chanda and Kusum caught hold the hands of the deceased Tek Chand and thereafter Sumer Chand ablaze him.

Keeping in view the deposition of the eyewitnesses produced by the prosecution, it is quite clear that the prosecution has tried to establish the role of the appellants as of catching hold the deceased at the time of the occurrence. Although, in the dying declaration it is not clear as to what is the specific role of the appellants, but the prosecution by way of producing the eye witnesses have tried to develop the case by attributing the role of catching hold the hands of the deceased by the appellants.

It is now to be seen whether the witnesses produced by the prosecution had occasion to see the actual incident or not. It is made clear at this stage that the actual assailant who was alleged to have sprinkled the kerosene oil on the deceased Tek Chand and thereafter put him ablaze, has died during the trial.

The incident is alleged to have been taken place inside the room of the deceased Tek Chand. The First Information Report also shows that Tek Chand and Sumer Chand (assailant) had taken liquor together. All of a sudden there was some hot altercation between Sumer Chand and Tek Chand and they started brick batting. After some time they again entered inside the room quarreling each other and thereafter, the appellants Chanda and Kusum caught hold the hands of the deceased Tek Chand and Sumer sprinkled the kerosene oil and put Tek Chand to ablaze inside the room. The First Information Report further reveals that when deceased Tek Chand raised hue and cry then the informant – Chando (P.W.1) as well as other witness extinguished the fire and took the injured to the hospital.

As per the sight plan, the witnesses had assembled at point ‘D’ which is under the Guava tree and the incident has taken place on the point ‘A’, ‘B’ and ‘C’. The place where the actual incident has taken place, is a room and there is only one door for ingress and aggress. Thereafter in front of this room, there is a covered Varanda which has also one door and a person who would be coming out of the room will have to cross the covered Varanda and thereafter that person would be able to come out through that door opened to *“Sahan”* where the Guava tree is situated, under which the witnesses had been standing. Therefore, in case, if the witnesses were present at Guava tree at the time of the actual occurrence then there is no opportunity available to the witnesses to see the actual incident.

Further, the evidence of the eye witnesses before the Court shows that Chando (P.W.1) has deposed that there is adjacent room belonging to the mother of Tek Chand to the room of Sumer and Varanda of both the rooms is the same and

it is covered. She has further deposed that there is one and common door of this Varanda. She has further deposed that when there was brick batting going on between Sumer and Tek Chand, she was inside her room and from there she could not see anything inside the room of Sumer and Tek Chand. She has further deposed that Tek Chand – deceased came in front of her room in a burnt condition. She has also stated when Tek Chand came in front of her room then the flames from his body were exploring. This witness in his examination has further deposed that first of all when she saw Tek Chand burning then at that time she was sitting in her room and seeing Tek Chand having flames, thereafter, she came out of her room. This witness has deposed that when Tek Chand and Sumer entered in their room quarreling each other then she along with other person came under the Guava tree. Further this witness has stated that when Tek Chand was having flames on his body then she came out of his room and at that time she was standing under the tree. Therefore, from any iota of evidence available on record it cannot be concluded as to any opportunity of witnessing the incident was available to this witness. In case, if she was present inside her room, she could not have seen anything happening inside the room of Sumer and Tek Chand and suppose if her statement is taken true that she was standing under the Guava tree even then on the basis of the sight plan this witness had no opportunity to see the actual incident happening inside the room of Sumer.

Likewise, deposition of Raj Kumar (P.W.2) reveals that at the time of the occurrence he was sitting in the room of Chando (P.W.2) informant. This witness has deposed that Sumer, Chanda and Kusum have been sitting with the deceased

Tek Chand, who was having liquor with Sumer Chand. After some time they had some altercation and Sumer and Tek Chand came out of their room and they started brick batting. They again entered in the room quarreling each other and after some time this witness saw that Chanda and Kusum caught hold the hands of Tek Chand and Sumer sprinkled the kerosene oil and put him ablaze.

This witness, in his cross examination deposed that Tek Chand's mother room is adjacent to his room and Sumer and Tek Chand room is adjacent to the room of Tek Chand's mother room. He has stated that in front of these rooms there is a common covered Varanda which consist only one door for ingress and aggress. This witness has further deposed that from inside the room of Chando (P.W.1) informant one cannot see anything happening in the room of Sumer and Tek Chand i.e. place of the occurrence. He has also stated that from her room and from the room of Tek Chand's mother and from the front of Varanda of these rooms, one cannot see anything inside the room of Tek Chand. This witness has further deposed that at the time of the actual incident, he was sitting under the Guava tree and Chando (P.W.1) informant was also sitting from his side. This witness has further deposed that Tek Chand came out in a burning condition. This witness has although tried to depose that he could see actual incident inside the room the Tek Chand from the Guava tree but as we have already observed that it is not possible from the Guava tree to see as to what was happening inside the room of Tek Chand. This witness has further deposed that there is a covered Varanda in front of the place where she was standing. Therefore, the deposition of this witness also creates doubts on the prosecution story and it

cannot be assessed on the basis of the evidence available on record that the alleged eyewitnesses produced by the prosecution have any opportunity to see the actual occurrence.

It is noteworthy to mention here that the actual incident of setting Tek Chand ablaze by the assailants occurred inside the room but none of the domestic articles could catch the fire. The police when inspected the room i.e. place of occurrence then found that no household goods kept inside the room could catch fire. It is also pertinent to mention here that as per the prosecution case, the appellants were catching hold the hands of the deceased at that time when Sumer set the deceased to fire. But it is quite strange that none of these appellants could sustain any burn injury on their persons during the course of occurrence.

The defence has come with a suggestion that Tek Chand was over drunk at the time of the occurrence and while he was cooking his food he caught fire resulting burn injuries on his person and he died on account of the same. This suggestion appears to be forceful. There could be every possibility that Tek Chand could have sustained the burn injuries while cooking the food inside his room and when he caught fire, he immediately ran out of his room where the witnesses were standing. In either case none of the prosecution witness had an opportunity to see the actual occurrence. It can be just a suspicion that the appellants and the other assailant Sumer were present inside the room in the company of the deceased Tek Chand might have committed the murder of Tek Chand by setting him to fire. It could be only a surmise and conjecture. However, the case of the prosecution is not established beyond reasonable doubt and we find ourselves unable to accept the

contention of the prosecution that the actual occurrence was witnessed by any of the prosecution witnesses.

We do not disbelieve the dying declaration recorded by Tehsildar in the present case, but as we have already observed that the role assigned to the appellant could not be established by the prosecution by way of any cogent or reliable evidence. The dying declaration cannot be considered to be complete in the sense that the role has not been attributed to the appellants therein and whatever the role has been attributed to the appellant by the prosecution in the evidence that too does not appear to be trustworthy.

We, therefore, come to the conclusion that is would not be safe to rely on such dying declaration in the facts and circumstances of the case.

For the reasons stated above we consider it unsafe to rely upon the prosecution evidence to base the conviction of the appellants for having committed the murder of the deceased Tek Chand hence giving the benefit of doubt.

We, therefore, allow this appeal and set aside the impugned judgment and order passed by the Court below convicting the appellants under Section 302/34 I.P.C.

The appeal is accordingly allowed.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

September 17, 2004
ASWAL